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13 **UNITED STATES BANKRUPTCY COURT**
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

15 **In re:**
16 DAMIAN ROBERT KUTZNER
17 Debtor

Case No.8:17-bk-11895-ES

CHAPTER 7

18 FEDERAL TRADE COMMISSION,
19 Plaintiff,
20 v.
21 DAMIAN KUTZNER
22 Defendant.

Adversary No.

**COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT
OWED TO FEDERAL TRADE
COMMISSION**

(Hearing date to be set by summons)

The Federal Trade Commission (“FTC” or “Commission”) brings this adversary proceeding pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(6), and (c) seeking an order determining that a judgment in its favor against Defendant Damian Robert Kutzner (“Debtor,” “Defendant,” or “Kutzner”) is excepted from discharge.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. § 523. This Adversary Proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

2. Venue in the Central District of California is proper under 28 U.S.C. § 1409(a).

3. This Adversary Proceeding relates to *In re Damian Robert Kutzner*, Case No. 8:17-bk-11895, a Chapter 7 case now pending in this Court (“Bankruptcy Case”). The FTC seeks to except from discharge an \$18,376,499.15 contempt sanction against Kutzner arising from his violation of an order entered in a consumer protection case styled *FTC v. GM Funding Inc., et al.*, No. Case No. SACV 02-1026 DOC (MLGx) (C.D. Cal.) (Carter, J.) , Stipulated Order Modifying the Stipulated Judgment and Order for Permanent Injunction as to Defendants GM Funding Inc., Robert D. Kutzner, Global Mortgage Funding Inc., and Damian R. Kutzner, DCt ECF No. 96 (Jan. 9, 2017) (“Contempt Order and Judgment”), **FTCX 1**. The Judgment also includes injunctive and other equitable relief, which has not been stayed by Debtor’s bankruptcy filing.

4. Plaintiff FTC consents to entry of a final judgment by the Court in this proceeding.

THE PARTIES

5. Plaintiff FTC is the United States agency that protects consumers by enforcing the FTC Act, 15 U.S.C. §§ 41-58, which prohibits deceptive trade practices. 15 U.S.C. § 45(a). The FTC Act authorizes the Commission to file suit in federal district court to enjoin violations of the statute and obtain other equitable

relief, including rescission of contracts and restitution and disgorgement of ill-gotten gains. 15 U.S.C. § 53(b). The Commission may also seek contempt sanctions to compensate consumers for violations of orders in such cases.

6. Defendant is the Debtor in the Bankruptcy Case, now pending before this Court. Kutzner was a founder and the Chief Operating Officer of Brookstone Law P.C.¹, and a principal or controlling person of Advantis Law P.C.² Kutzner, in connection with the matters alleged herein, has transacted business in this district.

PRIOR PROCEEDINGS AND DEFENDANT'S DECEPTIVE AND CONTUMACIOUS CONDUCT GIVING RISE TO THE NONDISCHARGEABLE DEBT

A. The 2002 Proceeding and 2003 Order

7. The FTC first filed suit against Kutzner in 2002 in the case styled *FTC v. GM Funding Inc., et al.*, No. Case No. SACV 02-1026 DOC (MLGx) (C.D. Cal.) (“2002 Proceeding”). As alleged in its 2002 complaint, Kutzner engaged in a deceptive and unfair email spamming scheme. His companies spammed consumers from email addresses similar to banks and other legitimate enterprises, including Radian Group Inc., Radian Guaranty Inc., Prudential Inc., and the Fannie Mae Corporation. These emails prompted consumers to go to websites where they would then disclose their name, address, phone number, email address, and mortgage details. Kutzner’s companies would then solicit these consumers for mortgages and mortgage refinancing.

8. To resolve the allegations, Kutzner stipulated to the entry of an order, which imposed a permanent injunction. Stipulated Judgment and Order for

¹ “Brookstone” includes both the California and identically named Nevada companies.

² “Advantis” includes both Advantis Law P.C. and Advantis Law Group P.C., unless otherwise noted.

1 Permanent Injunction as to Defendants GM Funding, Inc., Robert D. Kutzner,
2 Global Mortgage Funding, Inc., and Damian R. Kutzner (May 5, 2003) (the “2003
3 Order”), 2002 Proceeding DCt ECF No. 36, **FTCX 2**. The injunction prohibited
4 Kutzner from, among other things, “making any express or implied
5 misrepresentation or omission of material fact that is false or misleading, in any
6 manner, directly or indirectly, to any consumer or entity. . . .” 2003 Order, Section
7 II. Both Kutzner and his counsel signed and stipulated to the 2003 Order. *Id.* at
8 14.

9 9. As more fully described below, Kutzner has continued to operate
10 deceptive businesses in violation of the 2003 Order.

11 **B. The 2016 FTC Action**

12 10. On May 31, 2016, the FTC filed a *de novo* action against Kutzner
13 alleging violations of the FTC Act and Mortgage Assistance Relief Services Rule
14 (“MARS Rule”), 16 C.F.R. Part 322, recodified as Mortgage Assistance Relief
15 Services, 12 C.F.R. Part 1015 (“Regulation O”), related to fraudulent mortgage
16 assistance relief services (“FTC Action”).³ Kutzner’s co-defendants in the FTC
17 Action included the companies Brookstone Law P.C. (Nevada and California),
18 Advantis Law P.C., and Advantis Law Group P.C. The other original individual
19 defendants were the enterprise’s “lawyers,” Vito Torchia, Jr., Jonathan Tarkowski,
20 R. Geoffrey Broderick, and Charles T. Marshall (collectively, “FTC Action Co-

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22

³ Kutzner was also a defendant in another action brought by the Department of Justice
23 on behalf of the FTC, *U.S. v. Global Mortgage Funding, Inc.*, SACV07-1275 DOC
24 (C.D. Cal.). Kutzner also entered into a Stipulated Judgment and Order for
25 Permanent Injunction (July 17, 2009) (the “2009 Order”). The FTC did not file a
26 contempt motion under the 2009 Order; only the United States, through the
27 Department of Justice, can seek contempt under that order. Nonetheless, as
28 described herein, Kutzner was plainly violating the 2009 Order’s telemarketing
ban.

1 defendants”). All defendants in the FTC Action, including Kutzner, were named
2 individually and as officers of Brookstone or Advantis. In July 2016, the FTC
3 filed an amended complaint to add Jeremy Foti as a defendant, alleging that he,
4 like Kutzner, was a non-lawyer with control over the enterprise.

5 11. From 2009 to 2010, Kutzner operated ULG, a mortgage assistance
6 “law firm” that offered advance-fee loan modifications. In October 2009,
7 California outlawed advance-fee loan modifications, with no attorney exemptions.
8 CA. Civ. Code § 2944.7. Simultaneously, ULG faced numerous allegations that its
9 two primary lawyers committed mortgage modification fraud. Both attorneys were
10 then disbarred, and ULG was raided by the FBI and the United States Postal
11 Inspectors. ULG was dissolved following the investigation and raid.

12 12. Kutzner has since pled guilty to criminal charges related to his
13 management of ULG.

14 13. Beginning around 2011, after ULG unraveled, Kutzner and his FTC
15 Action Co-defendants advertised, marketed, promoted, sold, and/or offered to sell
16 mortgage assistance relief services through Brookstone. Kutzner and his FTC
17 Action Co-defendants presented themselves as experienced lawyers and law firms
18 that included experienced litigators who would quickly, or without delay, file and
19 actively pursue lawsuits against lenders on consumers’ behalf. They targeted
20 distressed homeowners, many of whom had fallen behind on their mortgage
21 payments, and convinced them to purchase legal services by telling the consumers
22 that they were likely to prevail in lawsuits against their lenders. Often Kutzner and
23 his FTC Action Co-defendants told consumers they would receive at least \$75,000
24 by suing their lender. They then extracted thousands of dollars in upfront fees. In
25 return, they provided little or nothing.

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1 **Kutzner and his Cohorts Targeted Vulnerable Homeowners With Mass**
2 **Mailers Hawking Their Mortgage Assistance Relief Services**

3 14. Kutzner and his FTC Action Co-defendants preyed on distressed
4 homeowners. They identified consumers at risk of foreclosure and targeted them
5 with individualized mortgage assistance relief services, including mass joinder
6 lawsuits to void mortgage notes and other actions to stop foreclosures.

7 15. One letter, sent to consumers around May 2012, says, “You may
8 become a joined named plaintiff in a significant lawsuit that will seek, among other
9 things, to void your note(s).”

10 16. Another letter, sent to consumers around August 2015, states,
11 “Brookstone Law is preparing to sue the trustee assigned to foreclose on your
12 property for wrongful foreclosure and demand that they immediately cancel your
13 auction date.”

14 17. The marketing materials portrayed Kutzner’s companies’ legal
15 practitioners with the resources and experience to successfully litigate complicated
16 mass joinder cases. For example, in a May 2012 letter, Brookstone claimed that its
17 “team of lawyers . . . has substantial experience in lender fraud and related claims.”
18 It also claimed that “our team of experienced lawyers offers you a superior
19 alternative for recovery.”

20 18. Kutzner and his FTC Action Co-defendants further promoted the
21 companies’ litigation experience by telling consumers “[i]t may be necessary to
22 litigate your claims against your lender to get the help you need and our lawyers
23 know how to do so.”

24 19. Kutzner and his FTC Action Co-defendants told consumers that they
25 could become a plaintiff in a significant litigation seeking “to void your note(s), to
26 give you your home free and clear, and/or to award you relief and monetary
27 damages.”

1 20. Kutzner and his FTC Action Co-defendants' marketing materials
2 urged homeowners to act quickly and call Defendants in order to preserve their
3 legal options.

4 21. For example, the May 2012 letter reads, "You should act now!
5 Waiting may eliminate or reduce the many options you have available." The letter
6 goes on to say, "We encourage you to take prompt action by contacting us before
7 05/12/2012."

8 22. Similarly, an August 2015 letter identifies a recent California
9 Supreme Court decision and tells consumers, "**URGENT the above decision will**
10 **NOT stop the sale of your home so you MUST contact us now . . . Your home**
11 **will be sold at Auction unless you take immediate action.**" Further, below the
12 letter emphasizes "*Scheduled Trustee Auction Date: 8/26/2015*".

13 23. Both the May 2012 and August 2015 letters were individually tailored
14 for specific consumers. For example, the May 2012 letter was addressed to the
15 homeowner by name, and contains at the bottom a table with the homeowner's
16 name, a "Client Case ID#", the homeowner's total loan amount, the homeowner's
17 parcel ID, and the property zip code. The August 2015 letter was also addressed to
18 the homeowner by name, followed by a "Client ID #." The letter includes the
19 name of the homeowner's mortgage lender, followed by the homeowner's name
20 and address.

21 24. Nowhere in the May 2012 or August 2015 letters did Kutzner and his
22 FTC Action Co-defendants include any of the following disclaimers:

23 a. "You may stop doing business with us at any time. You may
24 accept or reject the offer of mortgage assistance we obtain from
25 your lender [or servicer]. If you reject the offer, you do not
26 have to pay us. If you accept the offer, you will have to pay us
27 [amount or method for calculating the amount] for our
28 services";

- 1 b. “[Brookstone or Advantis] is not associated with the
- 2 government, and our service is not approved by the government
- 3 or your lender”; or
- 4 c. “Even if you accept this offer and use our service, your lender
- 5 may not agree to change your loan.”

6 25. Kutzner and his FTC Action Co-defendants likewise did not include
7 such disclaimers in the other, similar letters that they sent to homeowners.

8 26. In addition to consumer-specific communications, Kutzner and his
9 FTC Action Co-defendants also solicited business from distressed homeowners
10 through websites advertising Brookstone and Advantis: www.brookstonelaw.com,
11 www.advantislaw.com.

12 27. For example, the Brookstone website trumpeted its experience,
13 stating, “This is an important announcement for anyone in America who currently
14 is in danger of losing their home due to foreclosure or other related action of their
15 lender. There is help available for you now. Brookstone Law has a team of
16 experienced litigation attorneys that can help people victimized by violations
17 where banks, loan servicers, or others have taken advantage of honest
18 homeowners.”

19 28. Although purportedly separate law firms, both Brookstone and
20 Advantis advertised the same services on their websites, in many instances using
21 identical language.

22 29. Both the Brookstone and Advantis websites used identical language in
23 describing their real estate legal services, each claiming: “Every transaction in the
24 world of real estate is essentially a contract negotiation and a business transaction.
25 At the same time there is often a strong element of emotion involved in real estate
26 ownership and possession. . . . We proceed with decisiveness while exercising
27 caution as necessary to avoid litigation and resolve disputes in the most
28 expeditious, beneficial way for our clients.”

30. Both the Brookstone and Advantis websites touted the mass joinder suit *Wright v. Bank of America* as their own. Both websites use the same description for the case: “This lawsuit arises from: (1) Defendants’ deception in inducing Plaintiffs to enter into mortgages from 2003 through 2008 with the Countrywide Defendants; (2) Defendants’ breach of Plaintiffs’ Constitutionally and statutorily protected rights of privacy; and (3) Defendants’ continuing tortious conduct intended to deprive Plaintiffs of their rights and remedies for the foregoing acts.”

31. Nowhere on their websites did Kutzner and his FTC Action Co-defendants include any of the following disclaimers:

- a. “[Brookstone or Advantis] is not associated with the government, and our service is not approved by the government or your lender”; or
- b. “Even if you accept this offer and use our service, your lender may not agree to change your loan.”

32. In all of these communications, Kutzner and his FTC Action Co-defendants encouraged homeowners to contact them through one of their toll-free numbers.

When Consumers Responded to the Mass Mailers, Kutzner and His FTC Action Co-Defendants Promised Consumers Lawsuits and Favorable Results

33. Once homeowners called Kutzner and his FTC Action Co-defendants, sales representatives convinced them that they were signing up for lawsuits, and that by so doing they would achieve favorable results.

34. Kutzner and his FTC Action Co-defendants' main products were "mass joinder" lawsuits against the homeowners' mortgage lender. These lawsuits join dozens, or even hundreds, of individual plaintiffs in a single action against a particular lender. These are not class action lawsuits. Each individual plaintiff's

1 claim must be separately proven and, in the event of a trial, each individual
2 plaintiff would have a separate trial. For example, Kutzner and his FTC Action
3 Co-defendants filed *Wright v. Bank of America* on behalf of over 900 plaintiffs
4 asserting unique claims. As alleged, they shared some factual overlap, such as the
5 alleged fraud on the market to drive up home prices, but do not share any other
6 particulars, each of which would need to be proven for a specific plaintiff to
7 prevail. The FTC Action Co-defendants filed similar suits against a number of
8 other banks, including CitiGroup, JP Morgan Chase, Wells Fargo, Ally Bank,
9 OneWest Bank, and Ocwen Financial Corporation.

10 35. On numerous occasions, Kutzner and his FTC Action Co-defendants
11 presented these lawsuits as, among other things, ways to delay foreclosures,
12 negotiate loan modifications, or obtain forbearance on mortgage payments. For
13 example, one consumer was told that because his claim was worth \$75,000 the
14 bank would seek to renegotiate the loan amount.

15 36. Kutzner and his FTC Action Co-defendants' offers included
16 unsupported assessments about the likelihood of success. Such assessments started
17 with a homeowner's very first conversation with a telemarketer—non-lawyers
18 charged with collecting the homeowner's information.

19 37. Once telemarketers convinced homeowners to come into Kutzner's
20 and his FTC Action Co-defendants' offices for in-person meetings, they gave
21 homeowners further assessments of their likelihood of success in the mass joinder
22 cases.

23 38. During these initial meetings, Kutzner and his FTC Action Co-
24 defendants told consumers they needed to perform a "legal analysis" to evaluate
25 the viability of a claim against their mortgage holder. Consumers paid Kutzner
26 and his FTC Action Co-defendants \$895, and sometimes more, before they would
27 conduct their "legal analysis."

1 39. On numerous occasions, Kutzner and his FTC Action Co-defendants
2 then provided homeowners a “legal analysis,” stating that the fraud in their
3 mortgage paperwork was obvious. Kutzner and his FTC Action Co-defendants
4 told such homeowners that they were likely, or even certain, to prevail, if they
5 retained them for a mass joinder suit against their lender. On numerous occasions,
6 Kutzner and his FTC Action Co-defendants told homeowners that they would
7 recover “at least \$75,000.”

8 40. Additionally, Kutzner and his FTC Action Co-defendants told
9 consumers they would quickly file a lawsuit and actively litigate on their behalf.

10 41. Although Kutzner and his FTC Action Co-defendants’ mass joinder
11 litigations are purportedly “contingency fee” actions, Kutzner and his FTC Action
12 Co-defendants collected both upfront fees and continuing payments from
13 consumers. Kutzner and his FTC Action Co-defendants charged homeowners a
14 recurring monthly fee to maintain their status as named plaintiffs.

15 42. Kutzner and his FTC Action Co-defendants received at least \$15
16 million through 2014.

17 43. Kutzner and his FTC Action Co-defendants did not deposit payments
18 in client trust accounts, as required by law. Instead, they treated these funds as if
19 they were fully earned, and used them for expenses as they received them.

20 44. On numerous occasions, homeowners asked for refunds for amounts
21 paid because they had received no service or benefit. On many of these occasions,
22 Kutzner and his FTC Action Co-defendants refused homeowners’ requests.

23 **Kutzner and his FTC Action Co-Defendants Did Not Deliver Promised**
24 **Outcomes or Quickly File Lawsuits**

25 45. Kutzner and his FTC Action Co-defendants’ promises to quickly file
26 lawsuits that would provide homeowners substantial monetary awards, lower
27 mortgages, or voided notes had no reasonable relationship with any actual services
28 they provided or outcomes they achieved for homeowners.

1 46. Kutzner and his FTC Action Co-defendants never won a single mass
2 joinder lawsuit on the merits.

3 47. Far from the certainty of winning “at least \$75,000,” and possibly
4 obtaining their homes free and clear of any mortgage, Kutzner and his FTC Action
5 Co-defendants did not even seek such relief. In fact, as early as February 2012,
6 Kutzner and his FTC Action Co-defendants tried to avoid federal court jurisdiction
7 by arguing on their clients’ behalf that they were, in fact, not seeking to void their
8 clients’ notes or obtain their clients’ homes free and clear. Eleven of the twelve
9 Brookstone mass joinder cases filed before 2016 were dismissed. In March and
10 April 2016 Kutzner and his FTC Action Co-defendants filed three more mass
11 joinder cases.

12 48. Brookstone’s mass joinder cases have been dismissed for varied
13 reasons, including for lack of prosecution, for misjoinder, on demurrer, and on
14 voluntary dismissal. Of their original cases, the only surviving case is *Wright v.*
15 *Bank of America*, No. 30-2011-449059 (Sup. Ct. Cal. Orange County). No court
16 has spoken to the merits of the claims in that lawsuit. Initially dismissed for
17 misjoinder, the California Court of Appeals allowed it to proceed in spite of its
18 “desultory and scattered allegations,” but required Kutzner and his FTC Action
19 Co-defendants to replead the Complaint into an intelligible pleading. *Wright v.*
20 *Bank of America*, 232 Cal. App. 4th 238, 254 (2014), review denied (Mar. 25,
21 2015). It then took Kutzner and his FTC Action Co-defendants almost ten months
22 to file their fourth amended complaint in January 2016; Brookstone told the court it
23 would need to amend its complaint again. Kutzner and his FTC Action Co-
24 defendants never took any affirmative steps to prosecute these cases. Instead, they
25 did minimal work, only sometimes responding to demurrers, while filing amended
26 complaints adding additional consumers they have signed up. They did not pursue
27 discovery in their cases, either not seeking discovery or agreeing to stays of
28

1 discovery. In several instances, they voluntarily dismissed the cases without
2 prejudice and never refiled the cases to pursue their paying clients' claims.

3 49. Kutzner and his FTC Action Co-defendants did not perform the tasks
4 that they promised their clients they would undertake. For example, on numerous
5 occasions, Kutzner and his FTC Action Co-defendants told homeowners that they
6 would add them as plaintiffs to mass joinder cases, but never did so. On numerous
7 other occasions, Kutzner and his FTC Action Co-defendants told homeowners they
8 would be added to lawsuits shortly, but months passed before they were added.

9 50. Kutzner and his FTC Action Co-defendants did not communicate with
10 clients or respond to client requests about how they were litigating the clients'
11 case. Numerous clients repeatedly asked for updates regarding how their case was
12 proceeding and received no response whatsoever. When Brookstone vacated its
13 offices in late 2014, Kutzner and his FTC Action Co-defendants refused to tell
14 clients the location of its new office; then, when pressed, lied to its clients about
15 where its offices were located.

16 51. Kutzner and his FTC Action Co-defendants did not tell clients that
17 their lawsuits had been dismissed and continued collecting monthly fees. Often
18 clients determined on their own that their cases had been dismissed.

19 52. In August 2014, the California Bar court found Torchia, Brookstone's
20 then-lead lawyer, had violated his ethical duties to his clients with respect to
21 provision of mortgage-related services, including 16 counts of misconduct, such as
22 failure to perform legal services with competence, failure to maintain records of
23 client funds and render appropriate accounts to the client, failure to return unearned
24 funds, and failure to return client papers/property.

25 53. During his ethics trial, Torchia testified he did not have the experience
26 to be lead counsel on the mass joinder cases. He further conceded that Brookstone
27 failed to provide the most basic elements of legal representation, including
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1 properly communicating with clients, adequately explaining what consumers
2 should expect from the representation, and returning unearned fees.

3 54. Confirming Torchia's own admissions, the California Bar court found
4 that Torchia "lacked and continue[d] to lack the law-office-management skills and
5 basic knowledge of mortgage lending law and bankruptcy law necessary to
6 adequately and properly represent some 4,000 mortgage loan clients." (Emphasis
7 supplied.)

8 55. Similarly, Tarkowski did not have any relevant experience, let alone
9 experience litigating complicated fraud cases on behalf of several hundred separate
10 plaintiffs.

11 56. Contrary to Kutzner and his FTC Action Co-defendants' claims that
12 they knew how to obtain the promised results and had the ability to pursue these
13 claims, they in fact did not have any attorneys on staff with the relevant experience
14 or sufficient resources to simultaneously litigate hundreds or thousands of fraud
15 cases.

16 **C. 2016 Contempt Proceedings**

17 57. Based on the course of conduct described above, the FTC
18 concurrently filed an order to show cause why Kutzner should not be held in
19 contempt for violating the 2003 Order. 2002 Proceeding DCt ECF No. 39,
20 Plaintiff's Notice and Application for an Order to Show Cause Why Kutzner
Should Not Be Held in Contempt, filed June 27, 2016 ("Contempt Application").

22 58. To resolve the allegations in both the Contempt Application and the
23 2016 FTC Action, the FTC and Kutzner entered into the stipulated Contempt Order
24 and Judgment, which dismissed Kutzner as a defendant in the 2016 FTC Action,
25 and entered a modified permanent injunction and monetary judgment in the 2002
26 Proceeding in the amount of \$18,376,499.15. The Contempt Order and Judgment
27 also includes injunctive and other equitable relief.

59. As part of the Contempt Order and Judgment, Kutzner further agreed that the Judgment was not dischargeable in bankruptcy and agreed that the facts alleged in the Contempt Application are true, without further proof, in any subsequent litigation, including a nondischargeability action in any bankruptcy case. Contempt Order and Judgment, V.B.

60. Kutzner further stipulated that the facts alleged in the Contempt Application establish all of the elements necessary to establish nondischargeability of the Judgment under 11 U.S.C. § 523(a)(2)(A), and that the order would have collateral estoppel effect for such purposes. *Id.*, V.C.

COUNT I

(NONDISCHARGEABLE DEBT FOR MONEY OBTAINED BY
FALSE PRETENSES, FALSE REPRESENTATIONS OR ACTUAL FRAUD)

61. The Commission repeats and realleges the allegations in ¶¶ 1 through 60.

62. Debts for money, property, or services obtained by false pretenses, a false representation or actual fraud are not dischargeable. 11 U.S.C. § 523(a)(2)(A).

63. In connection with the advertising, marketing, promotion, offering for sale, or sale of mortgage assistance relief services, Kutzner and his FTC Action Co-defendants, or their agents falsely represented, directly or indirectly, expressly or by implication, that:

- A. Kutzner and his FTC Action Co-defendants were likely to obtain relief for consumers, including in some instances “at least \$75,000” or consumers’ homes free and clear;
- B. Kutzner and his FTC Action Co-defendants would seek to void consumers’ mortgages;

1 C. Kutzner and his FTC Action Co-defendants had a team of
2 experienced lawyers and personnel to litigate mass joinder cases
3 alleging lender fraud and related claims on behalf of hundreds or
4 thousands of clients simultaneously; and

5 D. Kutzner and his FTC Action Co-defendants would file lawsuits
6 on particular consumers' behalf.

7 64. In connection with the advertising, marketing, promotion, offering for
8 sale, or sale of mortgage assistance relief services, Kutzner and his FTC Action
9 Co-defendants, or their agents failed to make the following disclosures:

10 A. In general commercial communications:

11 i. “[Brookstone or Advantis] is not associated with the
12 government, and our service is not approved by the government
13 or your lender,” in violation of the MARS Rule and Regulation
14 O, 16 C.F.R. § 322.4(a)(1), 12 C.F.R. § 1015.4(a)(1); and
15 ii. “Even if you accept this offer and use our service, your
16 lender may not agree to change your loan,” in violation of the
17 MARS Rule and Regulation O, 16 C.F.R. § 322.4(a)(2), 12
18 C.F.R. § 1015.4(a)(2).

19 B. In consumer-specific commercial communications:

20 i. “You may stop doing business with us at any time. You
21 may accept or reject the offer of mortgage assistance we obtain
22 from your lender [or servicer]. If you reject the offer, you do
23 not have to pay us. If you accept the offer, you will have to pay
24 us [amount or method for calculating the amount] for our
25 services,” in violation of the MARS Rule and Regulation O, 16
26 C.F.R. § 322.4(b)(1), 12 C.F.R. § 1015.4(b)(1);

- 1 ii. “[Brookstone or Advantis] is not associated with the
- 2 government, and our service is not approved by the government
- 3 or your lender,” in violation of the MARS Rule and Regulation
- 4 O, 16 C.F.R. § 322.4(b)(2), 12 C.F.R. § 1015.4(b)(2); and
- 5 iii. “Even if you accept this offer and use our service, your
- 6 lender may not agree to change your loan,” in violation of the
- 7 MARS Rule and Regulation O, 16 C.F.R. § 322.4(b)(3), 12
- 8 C.F.R. § 1015.4(b)(3).

9 65. The course of conduct described above and in ¶¶ 1 through 60
10 constitutes deceptive acts or practices in violation of Section 5(a) of the FTC Act,
11 15 U.S.C. §45(a), and in violation of the MARS Rule and Regulation O, 16 C.F.R.
12 § 322.3(b), 12 C.F.R. § 1015.3(b).

13 66. Kutzner and his FTC Action Co-defendants conducted the activities
14 described in ¶¶ 1 through 60 with knowledge that they were engaged in a
15 fraudulent scheme, and with the knowledge of the falsity or deceptive omissions
16 and misrepresentations in the course of that scheme, or with reckless disregard for
17 the truth or falsity of the misrepresentations and omissions, and with an intent to
18 deceive consumers.

19 67. Kutzner and his FTC Action Co-defendants injured consumers by
20 knowingly engaging in a fraudulent scheme and knowingly making false
21 representations and deceptive omissions to consumers and using false pretenses in
22 dealing with consumers.

23 68. These false representations and false pretenses and deceptive
24 omissions were material to consumers in the course of deciding to purchase
25 products and services offered by Defendant and his FTC Action Co-defendants.
26 Consumers’ reliance on Defendant’s and his FTC Action Co-defendants’
27 omissions and misrepresentations was justifiable.

28 69. The total amount of money obtained from consumers by such false

representations and false pretenses or actual fraud is at least \$18,376,499.15, the monetary portion of the Contempt Order and Judgment entered against Defendant in the Contempt Action.

70. Consequently, the Judgment is a debt owed to the FTC for money, property, or services obtained by false representations, false pretenses, or actual fraud, and is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

COUNT II

(NONDISCHARGEABLE DEBT FOR WILLFUL AND MALICIOUS INJURY)

71. The Commission repeats and realleges the allegations in ¶¶ 1 through 60.

72. Debts for willful and malicious injury by a debtor to another entity or to the property of another entity are not dischargeable. 11 U.S.C. § 523(a)(6).

73. Defendant's contumacious conduct giving rise to the Contempt Order and Judgment was willful.

74. In connection with the advertising, marketing, promotion, offering for sale, or sale of mortgage assistance relief services, Defendant intentionally, deliberately and knowingly made false representations and deceptive omissions to consumers and used false pretenses in dealing with consumers, in violation of Section II of the 2003 Order.

75. The purpose of Section II of the Consent Order was to prevent Defendant from injuring consumers. Defendant's violation of that injunction was intentional, and injury to consumers was substantially certain to and did occur because of his contumacious conduct.

76. Defendant's contumacious conduct was malicious.

77. Defendant engaged in this conduct without just cause or excuse and his conduct resulted in \$18,376,499.15 in consumer injury.

78. Thus, the Contempt Order and Judgment is a debt owed by Defendant

1 to the FTC for willful and malicious injury by the debtor to another entity or to the
2 property of another entity, and is excepted from discharge pursuant to 11 U.S.C.
3 § 523(a)(6).

4 **COUNT III**
5

6 (COLLATERAL ESTOPPEL/ISSUE PRECLUSION)
7

8 79. Plaintiff FTC repeats and realleges the allegations in ¶¶ 1 through 60.

9 80. Defendant was a contempt defendant in the Contempt Application
10 filed in the 2002 Proceeding, and he actually litigated the Contempt Order and
11 Judgment.

12 81. The Contempt Application ended with a final judgment on the merits
13 against Defendant.

14 82. The issues underlying the FTC's contempt claims against Defendant
15 in the FTC Contempt Application are identical to the issues underlying the FTC's
16 claim in this action that the judgment is excepted from discharge under 11 U.S.C.
17 § 523(a)(2)(A) and (a)(6).

18 83. Defendant specifically agreed in the Stipulated Order that the facts as
19 alleged in the complaint in the Contempt Application shall be taken as true,
20 without further proof, for the purpose of any action to collect the judgment,
21 including, but not limited to, a nondischargeability complaint in any bankruptcy
22 case. Contempt Order and Judgment ¶ V.

23 84. Accordingly, Defendant is collaterally estopped from relitigating the
24 facts alleged in this Complaint.

25 WHEREFORE, plaintiff FTC requests that the Court:
26

27 28 (a) Determine that: (1) Debtor is collaterally estopped from relitigating the
facts alleged in this Complaint, and (2) the pre-petition debt owed by Debtor to the
FTC pursuant to the Contempt Order and Judgment entered by the United States

1 District Court for the Central District of California, in the case styled *FTC v. GM*
2 *Funding Inc., et al.*, No. Case No. SACV 02-1026 DOC (MLGx) (C.D. Cal.)
3 (Carter, J.), in the principal amount \$18,376,499.15, plus applicable interest
4 pursuant to 28 U.S.C. § 1961, is nondischargeable pursuant to 11 U.S.C.
5 §§ 523(a)(2)(A) and (a)(6); and

6 (b) Grant the FTC such other and further relief as this case may require and
7 the Court deems just and proper.
8

9 Respectfully submitted,

10 Dated: November 13, 2017

11 /s/ Katherine Johnson
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